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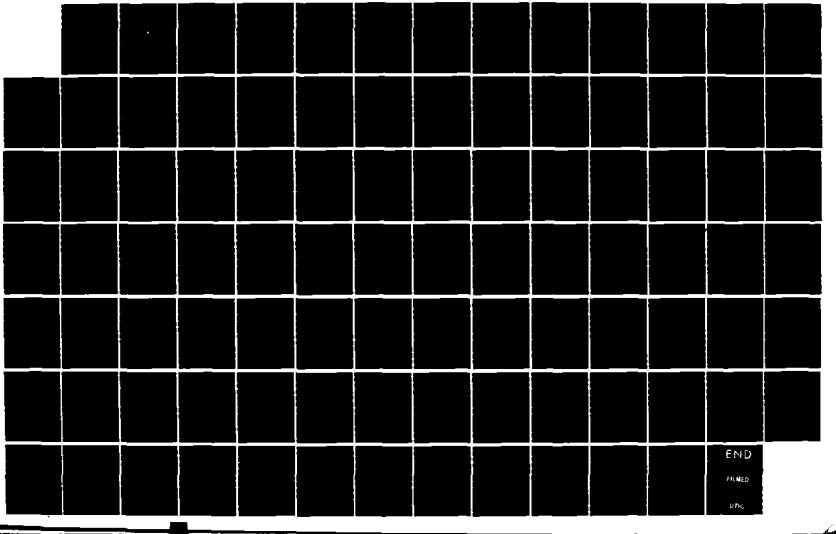

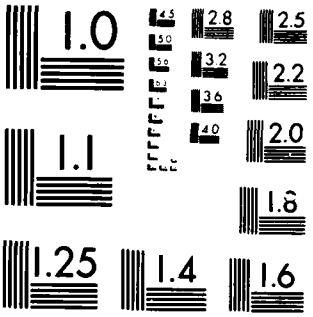

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NAVAL POSTGRADUATE SCHOOL
Monterey, California

THESIS

THE COMMERCIAL ACTIVITIES PROGRAM:
LESSONS LEARNED FROM LITIGATIONS

by

Bernard L. Roper

December 1985

Thesis Advisor: Paul M. Carrick

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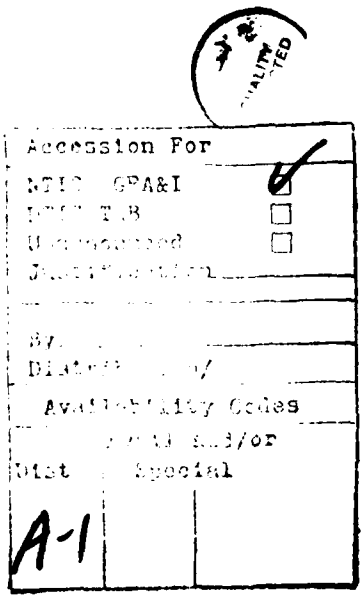

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The Commercial Activities Program:
Lessons Learned from Litigations

by

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Submitted in partial fulfillment of the
requirements for the degree of

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ABSTRACT

Deep rooted conflicts among key players in the Commercial Activities (CA) program pose a major threat to its viability. The controversies often result in litigations. This study examines legal decisions rendered by selected judicial entities on matters relating to OMB Circular A-76 implementation. It identifies lessons learned and recommendations for improvements to the CA process. The study concludes that the government has experienced great success in litigating A-76 disputes, primarily because the courts have taken the position that the propriety to contract out is an executive discretion not reviewable by them. The study recommends that government personnel should become infinitely familiar with General Accounting Office determinations since their decisions impact most heavily on the daily implementation of Circular A-76.

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I. INTRODUCTION

A. GENERAL COMMENTS

The Office of Management and Budget (OMB) Circular No. A-76 (Transmittal Memorandum No. 1) dated 12 August 1985, establishes the most recent federal policy regarding the performance of the Commercial Activities (CA) program. The basic policy is that the federal government should not start or carry on any commercial activities to provide services or products for its own use if such products or services can be obtained from private enterprises through ordinary business channels [Ref. 1:pp. 1-2].

OMB has argued that when properly implemented, the present A-76 process is an open, fair, and an effective process to ensure that government operations are performed well and at a reasonable price. To OMB, A-76 is sound management practice. Does the evidence support this claim? Most participants agree philosophically with the intent behind the CA program, that is:

> . . . if contractors can provide the same services for a lower cost, they should be considered as long as that service is not inherently governmental and as long as such contracting out would not contravene other established government objectives. [Ref. 2:p. 49]

Although economic theory and common sense may strongly support this noble goal, formulating and implementing guidelines, procedures and processes to execute this aim is where the opposing forces draw their battle lines, with OMB caught in the middle of the cross fire.

Current guidelines implementing this basic policy statement have evolved from decades of confrontations between various special interest groups within and outside the federal government. Federal employees have provided strong arguments to support their claims that CA policies have been historically biased and damaging toward them and the government as a whole. For example, the American Federation of Government Employees (AFGE-AFL-CIO) claimed that cost comparison loopholes in A-76 are designed to allow the administration to transfer federal sector work into the hands of supportive non-union companies beholden to the administration regardless of cost effectiveness [Ref. 2:p. 52].

On the other hand, arguments from the private sector have been equally articulated. The National Council of Technical Service Industries, in various letters written during 1984 concerning A-76, claimed that cost comparison studies were subject to bid rigging by government employees so that few commercial activities are contracted out.

The continual battle between opposing forces oftentimes manifests itself in legal disputes. Our judicial system's interpretation of Circular A-76 policies, procedures and practices and the resolution of disputed issues, therefore, become important considerations. Case law provides a wealth of information by which future guidelines, procedures and practices can be devised.

B. STUDY OBJECTIVES/AREA OF RESEARCH

The principle objective of this thesis is to identify potential and existing problems experienced in implementing the CA program, OMB Circular A-76, based on an analysis of selected legal cases. It will identify important considerations for planning, and managing the A-76 process using lessons learned from litigations.

C. SCOPE AND ASSUMPTIONS

This study will focus on legal decisions rendered by the General Accounting Office (GAO), Boards of Contract Appeals (BCA), U.S. Claims Court, U.S. Court of Claims, U.S. District Courts, U.S. Court of Appeals and the U.S. Supreme Court. It will not focus upon disputes handled by agencies' internal Administrative Appeal Boards (which are established under A-76 guidelines to settle certain contracting out disputes) or other administrative boards, such as the National Labor Relations Board. However, disputes handled by these judicial entities may be mentioned in this research effort if they are incidental to the areas focused upon.

Agency implementation of OMB Circular A-76 involves the effort and activities of numerous organizations within the federal government. Therefore, for the sake of simplicity and uniformity, the controlling document that will be used as a basis for discussion is OMB Circular A-76 itself and not lower level implementation instructions or directions issued

by the Department of Defense (DoD) or other lower tiered federal agencies.

The scope of this thesis will also be limited as to only those pertinent areas highlighted by an examination of litigations. Pertinent areas to be addressed includes, but are not limited to, the formulation of performance work statements, the formulation of in-house government cost estimates, the preparation of bid and proposal solicitations, the evaluation of cost proposals, the awarding and execution of contracts, and the administration of contractor performance.

It is assumed the reader has familiarity with the acquisition process, particularly some basic knowledge of government contract law.

D. RESEARCH QUESTIONS

In support of the study objectives and area of research, the following primary research questions were addressed:

1. What key issues and problems in implementing the program are revealed by litigations and how might the results of these litigations be used by government personnel to improve the A-76 process?

2. In view of issues addressed by court cases, can distinct trends or patterns with regard to implementation be identified? If so, what do these trends or patterns indicate?

In support of the primary research questions the following subsidiary questions were also addressed:

1. What is the magnitude of litigations involving the CA process?

2. How do the results of litigations impact upon the CA process? Have litigations been a determining factor in the formulation of published regulations and policies?

3. What inherent weaknesses in OMB Circular A-76 guidelines are revealed by litigations? Is contracting out a practical undertaking in the "real world" litigious environment?

4. How might the results of litigations be used to formulate practical guidelines and techniques for successful execution of the A-76 contractual process?

5. What factors determine good performance work statements?

E. RESEARCH METHODOLOGY

A computer-based file has constituted the major source of information. Federal Legal Information Through Electronics (FLITE), located in Denver, Colorado, is an automated legal research system established by the Department of Defense and operated by the Department of the Air Force for use by all federal agencies. FLITE's primary purpose is to use computer technology to help federal employees and military members obtain accurate and comprehensive legal research in less time and with less effort. FLITE does not render legal opinions or supply legal memoranda. Its role is to provide cases, decisions, statutes, regulations, and other legal references that are relevant to the user's problem.

FLITE was searched for litigations involving the CA program to obtain abstracts of decisions rendered by the Boards of Contract Appeal (BCA), Comptroller General, U.S. Claims Court, U.S. Court of Claims, U.S. District Courts, U.S. Court of Appeals and the U.S. Supreme Court. These abstracts were used as a "first cut" to identify significant problems, trends and issues in implementing A-76 contracts. Further screening and

analysis of noteworthy full-text decisions served as a foundation for in-depth analysis and discussions of issues. In addition, on site and telephone interviews with the government and industry personnel involved in the CA process were used to augment the aforementioned research efforts. See Appendix for listing of interviews.

F. DEFINITIONS

1. Commercial Activity: An activity which is either contracted or operated and managed by federal executive agency and which provides a product or service that could be obtained from private sources. It must be separable from other functions so as to be suitable for performance either in-house or by contract; and a regularly needed activity of an operational nature, not a one-time activity of short duration. Examples of CA include food services, health services, automatic data processing, etc. [Ref. 1:p. 2]

2. Governmental Function: A function that must be performed in-house due to the intrinsic relationship in executing governmental responsibilities. Examples include:

   a. Discretionary exercise of government authority such as judicial functions, management of government programs requiring value judgment, conduct of foreign relations, management and direction of the Armed Services, etc. [Ref. 1:p. 2]

   b. Monetary transaction and entitlements such as tax collection and revenue disbursements. [Ref. 1: p. 3]

3. Management Study: An internal management review performed by the government to determine the most efficient organization (MEO).

4. Performance Work Statement (PWS): Specification or description that describes output requirements of the government in-nouse operation in terms of basic minimal needs. It should also describe personnel responsibilities, facility/equipment requirements, performance standards and quality assurance plans to insure performance by either the government or the commercial vendor. [Ref. 3:p. III-1]

5. Private, Commercial Source: A private business, university, or other non-federal activity located in the United States, its territories and possessions, or the Commonwealth of Puerto Rico that provides a commercial product or service required by Government agencies. [Ref. 4:p. I-3]

6. Cost Comparison (or Cost Comparison Analysis): An accurate determination of whether it is more economical to acquire the needed products or services from a private, commercial source or from existing or proposed government managed CA. The term "CA Study" is often used interchangeably with the term "cost comparison analysis." [Ref. 4:p. I-3]

7. Privatization: Used synonymously with the term "contracting out" which is allowing private industry to perform more of the work previously done by government employees.

8. Existing In-House Commercial Activities: These are CA that are currently being performed by federal employees.

9. Expansion: An expansion is the modernization, replacement, upgrading or enlargement of a government commercial activity involving cost increases exceeding either 30 percent of the total capital investment or 30 percent of the annual personnel and material cost. [Ref. 3: p. I-2]

10. Existing Contracts: CA activities currently performed by contractors.

11. New Requirements: A newly established need for commercial product or service. [Ref. 3:p. I-3]

12. Breach of Contract: Prior to the Contract Disputes Acts of 1978, a term used to refer to contractor claims which alleged government failure to perform an expressed or implied duty for which no relief was available under the terms of the contract and thus fell outside the scope of the pre-act disputes process. [Ref. 5:p. 899]

13. Civil Action: Possessing the right or the legal capacity to influence someone's conduct through the use of civil courts and legal procedures.

14. "Purely" A-76 issues: These are defined as issues specifically pertaining to A-76 implementation. This differs from incidental post-award contract disputes covered by the Contracts Disputes Act (CDA) of 1978.

Once a contract resulting from A-76 implementation is legally consumated, it is treated generically like any other contract awarded under alternative source selection mechanism by Boards of Contract Appeals (BCA) or other federal courts having jurisdiction. These disputes involve matters "falling under" or "relating to" specific contracts, and not A-76 implementation. Therefore they are not considered to be "purely" A-76 issues.

G. THESIS ORGANIZATION

The organization of this thesis is formatted such that the reader can logically follow the development of lessons learned from litigations, beginning with conditions that contribute to controversies, and ending with the impact final determinations have had on the CA process.

Chapter I presented a brief discussion relating Circular A-76 controversies to case law. It also addressed the author's objectives and research methodology.

Chapter II provides the factual and conceptual groundwork to facilitate further meaningful discussions and in-depth analysis. It presents a brief historical overview of the development of the CA program, synopsizes the scope of today's CA program, and provides an overview of the judicial system as it relates to government contract law and CA disputes.

Chapter III presents various numerical and graphical illustrations of the data obtained from the computerized data base.

Chapter IV examines the legal decisions obtained from the FLITE data base. It explores detail issues and problems in implementing the CA program in terms of case analysis and

findings. It also identifies various trends indicated by an analysis of the data.

Chapter V highlights key issues, problems and trends in implementing Circular A-76, by identifying important lessons learned. These lessons learned were derived from the detail data analysis and findings presented in Chapter IV. Recommendations for improving the contracting out process are also provided. And finally, a brief summary, along with areas for future research are presented.

II. FRAMEWORK AND BACKGROUND

A. GENERAL

The Reagan Administration has repeatedly endorsed the need for free and open competition in the marketplace to promote a strong economy. The administration has further stated that correct and vigorous (emphasis added) implementation of OMB Circular A-76 policy will give the taxpayers what they deserve--economy in government--and contribute significantly to the recovery of the national economy [Ref. 6:p. 1]. Not surprisingly, the CA program has become a primary means by which the administration has attempted to achieve their goals.

The administration's support of the CA program is by no means the only factor that influences the degree to which CA becomes viable within the federal government. Congressional interests, federal government employees and commercial enterprises have, in the history of the CA program, been major players in shaping the policies that are expressed in the most recent revision to Circular A-76.

Conflicts among the key players are documented by a wealth of information. Congressional hearings, testimonies, statutes and regulations prohibiting contracting out of certain functions, revisions to the circulars, departmental implementation instructions, etc., are just a few of the sources that may be helpful in providing insights as to its viability. It is the

author's opinion that lessons learned from litigations provides another means by which the successful implementation of the CA program can be measured and evaluated. The court system has historically served as a forum for interpreting laws and resolving conflicts among governmental bodies and private citizens alike. Many times, the true test of the efficacy of governmental policies and actions are determined by the courts. This is particularly true in government contract law which derives its being from "case law."

This chapter lays the factual and conceptual groundwork to facilitate further meaningful and in-depth analysis of lessons learned from litigations. It accomplishes this by:

1. Presented a historical overview of the CA program.
2. Briefly synopsizing the scope of today's CA program.
3. Providing an overview of the judicial system as it relates to government contract law and CA disputes.

B. HISTORICAL BACKGROUND

1. Evolutionary Development of Circular A-76

As early as 1932, a special committee was established by the House of Representatives to determine if the government should continue to perform commercial functions that it began during World War I. In 1933, this committee recommended termination of many of these in-house functions. World War II saw a brief interruption in the move toward privatization. However, shortly thereafter, congressional interest resurfaced. [Ref. 7:p. 2]

It was not until 1954, during the Eisenhower Administration that the executive branch became a serious factor in attempts to shift activities from government to performance by private enterprises. In his budget address during the same year, President Eisenhower proclaimed, the ". . . budget marked the beginning of a movement to shift to . . . private enterprise federal activities which can be more appropriately and more efficiently carried on that way" [Ref. 7:p. 2]. Subsequently in 1955, the Bureau of Budget Bulletin Number 55-4 was issued. The bulletin echoed the President's basic policy and allowed exceptions to this policy when it was not in the public interest to do so. [Ref. 7:pp. 2-3]

A-76 circulars supporting this basic policy have undergone substantial evolutionary changes. The first Bureau of Budget Circular A-76 was issued in 1966 [Ref. 8:p. 2]. It differed from Bulletin Number 55-4 in that it specifically listed five basic exceptions when commercial or industrial-type functions were eligible to be performed in-house [Ref. 8: p. 7]:

a. Procurement from commercial sources would disrupt or delay a DoD program.

b. In-house performance is necessary to maintain military training or readiness.

c. A satisfactory commercial source is not available.

d. Products or services are available from other federal agencies.

e. Contract performance is more costly.

The Circular was revised the following year, 1967, as Office of Management and Budget Circular A-76, entitled, "Policies For Acquiring Commercial or Industrial Products and Services for Government Use." It attempted to address criticisms that A-76 guidelines were too vague and unstructured. It introduced numerous changes to clarify and expand upon the methods by which in-house and contracting out cost comparisons were to be conducted. It also required that cost analysis be conducted prior to initiating a new start or continuing a government function, unless in-house performance was clearly justified by one of the other exception criteria. The heavy emphasis on cost analysis was a major shift in contracting out policies. [Ref. 8:p. 7]

The decade of the 1970's continued to reflect concern that A-76 guidelines and procedures were too vague and that the implementation of these guidelines was not uniform across all agencies. It was felt that an objective, systematic system which would be uniformly applied was needed to insure credibility and fairness in deciding who would perform CA. In 1979, OMB Circular A-76 was revised to address these concerns. A systematic approach was used, including the development of performance work statements (PWS), management study reviews and detailed cost comparisons. The 1979 Revision also marked the publishing of a Cost Comparison Handbook (CCH) which provided detailed instructions for use by all agencies in

conducting cost comparison studies of in-house versus contractor's costs. [Ref. 8:pp. 9-10]

The 4 August 1983 version of A-76 (and its most recent update, Transmittal Memorandum No. 1, dated 12 August 1985) revised much of the guidance promulgated in the 1979 Cost Comparison Handbook. The cost comparison methodology was changed from the complex full cost method to a simpler incremental approach. It shortened the cost comparison form from 32 to 17 lines. Many of the complex cost computations that were often contested were either eliminated or replaced by standard cost factors. [Ref. 9:pp. 9-10]

2. Key Players and Their Special Interests

a. General

Revisions to A-76 have reflected the need to accommodate the desires and interest of diverse and conflicting groups both within and outside the federal government. A keen appreciation of who these groups are and their positions with regard to the CA program is important because it underlies the "grassroots" issues that fuel the controversies surrounding the program. It also provides an appropriate framework for discussions of resulting litigations.

Major combatants in the A-76 environment include such diverse groups as OMB (representing the executive branch interest), Congressional Subcommittees, the General Accounting Office (GAO), federal civil service employees and their associated trade unions, and private trade associations.

These groups can be simplistically categorized as advocates for contracting out, such as private trade associations, and opponents to contracting out which quite naturally include groups representing civil service employees.

b. Congress

Congress was initially an advocate of contracting out. Their recent actions strongly suggest that they now oppose many of the program's policies. For example, during hearings before the Subcommittee on Human Resources conducted 20-25 September 1984, the Chairman, Congressman Don Albosto of Michigan expressed ". . . concern about the impact of contracting out on the performance of certain government activities and on the ability of federal agencies to properly perform their missions" [Ref. 2:p. 2]. He questioned whether current CA guidelines properly identified which activities were inherently governmental in function and were therefore exempt from contracting out. He also expressed concern as to whether cost studies properly reflected accurate costs of in-house versus contractor performance. In particular, he was concerned about the effects contracting out had on the federal work force, considering the duty the government has as a responsible employer. Other more tangible actions have demonstrated Congressional opposition:

(1) The 1983 Defense Authorization provided a 6-month moratorium on any new contracting out in that department. [Ref. 2:p. 39]

(2) The Veterans Compensation, Education and Employment Amendment of 1982 prohibited contracting out certain activities in the Veterans Administration. [Ref. 2:p. 39]

(3) The fiscal year 1983 continuing resolution prohibited GSA from contracting out certain functions. [Ref. 2:p. 39]

c. Government Employees and Their Unions

The grassroots opposition to contracting out can be traced directly to federal employees. The American Federation of Government Employees, AFL-CIO, the largest federal sector union representing over 700,000 employees, has spearheaded the opposition. The union claims that revisions to A-76 have progressively worsened the situation for government employees by making it easier to convert in-house CA to contracts and that contracting out was only a ploy used by the administration to hide personnel cost from Congress and the public. They contended that current cost comparison policies were flawed because the total cost to the government of contracting out was not being recognized.

These loopholes in cost comparison studies (sometimes referred to as hidden costs) include inadequately weighing [Ref. 2:pp. 49-50]:

(1) The cost of lost accountability.

(2) The quality of services.

(3) The cost of increased uncertainty resulting from contractors' bankruptcies, cost overruns, strikes, etc.

(4) The cost of lost knowledge from a stable work force.

(5) Future governmental and social cost resulting from inadequate or nonexistent pension plans for contract employees.

(6) Dynamic long-term costs such as contractor buy-in with escalating costs in future years.

d. Private Enterprises

Private industry have provided strong support for the philosophical goals of CA, that is, that government should not be in the business of competing with its citizen for the production of commercial goods and services. However, they have also been equally critical of the specific means by which A-76 has tried to achieve that goal. Industry believes that the government agencies have continued to delay identifying, scheduling, and conducting cost comparison studies. They cite numerous improper actions conducted by agencies to discourage contracting out, including administrative harrassment, inaccurate PWS, and "devious" cost accounting. [Ref. 10: pp. 1-2]

e. Office of Federal Procurement Policy

As the prime implementor of A-76, the Office of Federal Procurement Policy (OFPP) has argued that CA assures open and fair competition and that through it, the American public is getting the best value for their tax dollars. They have tried to dispell criticism that the administration is using A-76 to reduce the federal civilian sector by professing that the circular does not mandate contracting out but rather, ". . . it recognizes that a dedicated, career federal work force is one of the government's most valuable resources, and it established a means for enhancing Federal productivity by challenging managers to find the most effective and efficient means of doing business at competitive prices" [Ref. 11:p. 5].

C. SCOPE OF THE CURRENT COMMERCIAL ACTIVITIES PROGRAM

1. Status of Commercial Activities Within the Federal Government

An OMB survey of federal agencies in 1981 found that approximately $6 billion in annual operating costs, $3 billion in capital investment and 226,000 positions were devoted to government operated CA subject to A-76. These CA positions represented about 10 percent of the federal civilian workforce. Approximately $14 billion worth of activities classified as CA are not included in the above inventory due to exemption, mainly because of national defense reasons. [Ref. 11:p. 9]

In March of 1985, OFPP reported that almost 1,700 cost studies have been conducted since 1979 resulting in average savings of 20 percent over the previous cost of CA to the government, regardless of whether federal employees or contractors won the competition. They also concluded that it was more economical to retain about 45 percent of the CA in-house after internal management reviews, with the other 55 percent of CA converting to contracts. [Ref. 11:pp. 1-8]

Although Circular A-76 requires completion of cost reviews on all inventoried CA by 30 September 1987, only 22 percent have been reviewed during the past five years. OMB is projecting that full implementation of Circular A-76 would result in savings exceeding $1 billion per year by 1988. [Ref. 11:pp. 1-8]

2. Status of Commercial Activities Within the Department of Defense (DoD)

The CA program is very important to the operation of DoD. Many of the commercial activities are base support services crucial to military readiness. They include activities such as intermediate and depot maintenance, health services, and automatic data processing. Since DoD has the majority of CA within the federal sector, it represents the prime area to generate potential cost savings. DoD experiences with A-76 has shown positive results:

> In April 1984, the DoD reported to Congress that contracting out saves money, helps small business and cost few employees their jobs. According to the report, contracts let between 1980 and 1982 saved the government about $250 million, roughly a quarter of the cost of in-house work. In addition, about 79 percent of the contracts went to small business and only 6 percent of the federal employees displaced by contractors were unable to retire or find another job with either the government or the contractor. [Ref. 6:p. 2]

Table 2.1, summarizes fiscal year 1984 DoD commercial activities workload, by DoD components. It shows that 172,000 (34 percent) contract workyear equivalents associated with DoD commercial activities were performed by contractors. On the other hand, 333,000 workyears (66 percent) of DoD commercial activities were performed by DoD civilian and military personnel. [Ref. 12:p. 4]

Table 2.2, summarizes fiscal year 1984 estimates of the total workload associated with major categories of DoD commercial activities. Note that depot maintenance accounts for the largest portion of CA (83,000 workyears) followed by other nonmanufacturing (78,000 workyears). [Ref. 12:p. 5]

TABLE 2.1

FY 1984 DOD COMMERCIAL ACTIVITY WORKLOAD--BY DOD COMPONENT

DoD Component	Estimated Workload -- In-House Workyears (000s)	(%)	Contract Workyears (000s)	(%)
Army	87	(60)	59	(40)
Navy/Marine Corps	189	(80)	48	(20)
Air Force	34	(35)	63	(65)
Defense Agencies	23	(92)	2	(8)
Total DoD	333	(66)	172	(34)

Source: The Office of the Assistant Secretary of Defense (Manpower, Installations and Logistics)

TABLE 2.2

FY 1984 DOD COMMERCIAL ACTIVITIES BY MAJOR FUNCTIONAL CATEGORY

Major Function	Estimated Workload -- In-House Workyears (000s)	(%)	Contract Workyears (000s)	(%)
Health Services	14	(93)	1	(7)
Intermediate Maintenance	13	(72)	5	(28)
Depot Maintenance	83	(77)	25	(23)
Installation Services	47	(55)	38	(45)
Other Nonmanufacturing	78	(76)	24	(24)
Automatic Data Processing	19	(68)	9	(32)
Products Manufactured In-House	7	(25)	21	(75)
Maintenance of Real Property	23	(53)	20	(47)
Social Services, Training, Other	49	(63)	29	(37)
Total DoD	333	(66)	172	(34)

Source: The Office of the Assistant Secretary of Defense (Manpower, Installations and Logistics)

Historical data for fiscal year 1985 is not yet available. However, Table 2.3, is a projection for fiscal year 1985 DoD commercial activities workload, by DoD component. It estimates approximately 505,000 CA workyears. Coincidentally, this is the same number as for fiscal year 1984. [Ref. 12:p. 15] For fiscal year 1985, DoD also anticipated that it would complete comparison studies involving 10,000 end strengths and that 50 percent of the completed studies would result in contracting out. [Ref. 12:p. 15]

TABLE 2.3

FY 1985 DOD COMMERCIAL ACTIVITY WORKLOAD--ALL FUNCTIONS

	Estimated Workload			
DoD Component	In-House Workyears (000s)	(%)	Contract Workyears (000s)	(%)
Army	86	(59)	60	(41)
Navy/Marine Corps	186	(78)	51	(22)
Air Force	33	(34)	64	(66)
Defense Agencies	23	(92)	2	(8)
	328	(65)	177	(35)

Source: The Office of the Assistant Secretary of Defense (Manpower, Installations and Logistics)

In summary, the potential for cost savings in DoD is substantive. CA in DoD seems to impact heavily in the area of base support operations. Based on past experience and the projections for fiscal year 1985, additional CA business for both large and small businesses are foreseeable.

3. Commercial Activities Guidelines and Procedures

Implementation of Circular A-76 requires an inventory of all agency activities to determine which functions are CA and subject to A-76 policies and to review those so identified to decide whether they will be performed in-house or by contractors. Agencies are also required to update their CA inventory annually and to make the lists available to the public upon request. Cost studies are conducted on existing in-house commercial activities, expansions, existing contracts and new requirements.

A cost study review consists of the following [Ref. 3: pp. IV-1,2,3]:

a. Defining the goods and services required by the government and the quality standards that must be adhered to. These requirements are expressed in PWSs which are supposed to emphasize the minimum output levels required by the government rather than specifying how the work should be performed. PWSs also establishes the baseline which the government and the contractor use to submit subsequent bids.

b. A mandatory internal CA managerial study is conducted on the in-house organization to identify essential functions to be performed, determine performance factors, and determine organizational structure, staffing and operating procedures for the most efficient in-house performance of commercial activities.

c. Competing contractors are solicited to submit bids on the PWS established by the government.

d. Contractor bids and the government in-house cost estimates are evaluated in accordance with the CCH to determine the most efficient bids.

e. An appeal period is established whereby protesters may present their cases to an Administrative Appeals Board.

f. After the appeals process, either a contract is awarded or the solicitation is cancelled and the function is

retained in-house to be performed in accordance with the MEO.

D. OVERVIEW OF THE FEDERAL JUDICIAL SYSTEM

1. General

Disputes involving Circular A-76 implementation are, by statute, resolved in the federal judiciary system, thereby precluding any discussion of state and local court systems. The Contract Disputes Act (CDA) of 1978, the Federal Courts Improvement Act (FCIA) of 1982 and the Budget and Accounting Act of 1921 are three prime pieces of legislation that have significantly impacted the jurisdiction and organization of our modern judicial system as it relates to civil disputes involving federal activities. Accordingly, a brief review of these pieces of legislation will facilitate a basic understanding of how disputes relating to Circular A-76 are litigated.

2. Contracts Disputes Act of 1978

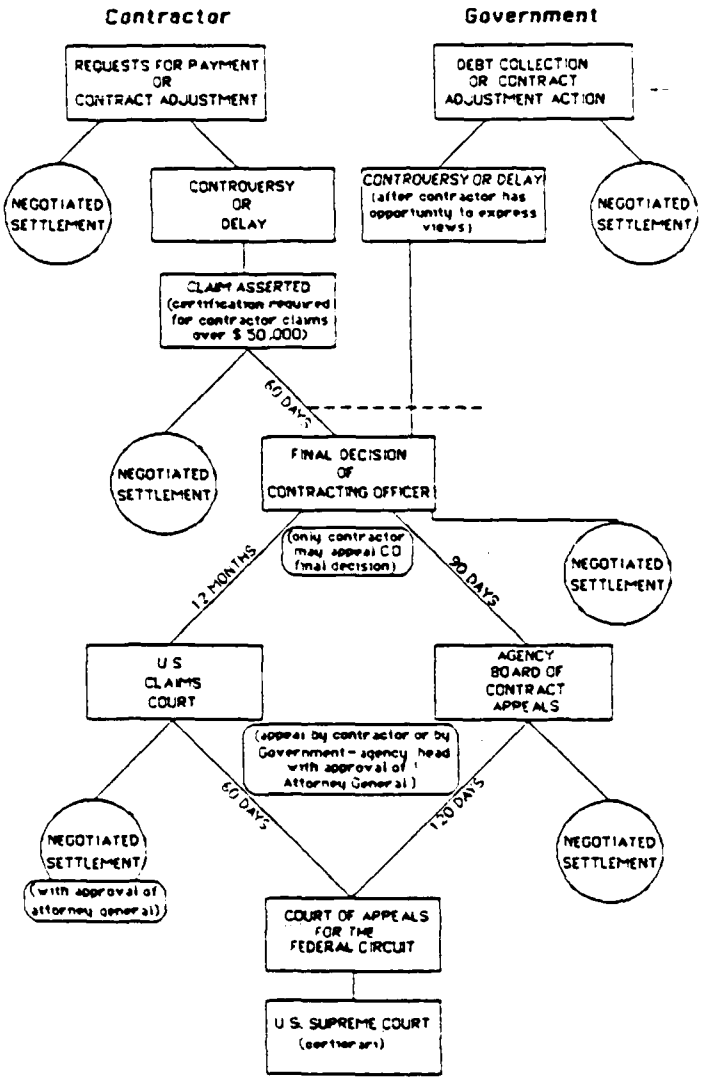
The CDA of 1978 establishes a comprehensive framework for the resolution of disputes between the government and contractors under certain covered government contracts [Ref. 13: p. 2]. These disputes are sometimes referred to as "post-award" contract disputes because it applies to issues arising subsequent to contract award. It is also applicable to express or implied contracts of executive agencies or certain non-appropriated fund activities (Exchange Services only). [Ref. 13: p. 2]

Under the pre-act system the contractor had limited direct access to federal courts to resolve disputes because

only breach of contract cases could be appealed under the Tucker Act of 1887 [Ref. 14:p. 145]. Other shortcomings in the pre-act disputes process were prevalent:

> The disputes process was a curious melange of contract clauses, procuring agency regulations, judicial decisions and statutary coverage without any comprehensive legislative scheme. The disputes procedures were based on executive agencies issuing specific contract provisions detailing administrative dispute procedures. Agency Board of Contract Appeals were traditionally appointed by, reported to, and were paid by the agency involved in the disputes. These in-house boards often decided cases concerning action by senior officials in the same agency. [Ref. 14:p. 145]

Under the CDA, the contracting officer's authority was broadened to include matters relating to the contract as well as matters arising under the contract, thereby eliminating the restrictions imposed by the "breach of contract" limitations. It allowed for the creation of full-time agency boards and gave expanded jurisdiction and powers such as the authority to administer oaths, authorize depositions and discovery proceedings and to subpoena witnesses and documents. It also allowed the contractor direct access to the federal court system and established a systematic process by which a dispute is handled in the judiciary system. Figure 2.1 provides a sequential flowchart (including time allowed for various appeals) of the dispute process set forth in the CDA of 1978 as amended by PL 97-164 (FCIA of 1982). The chart illustrates that a dispute first requires a Contracting Officer's final determination, which can then be appealed through various litigative channels. Another distinguishing feature of the CDA of 1978 is the nature of relief it provides, monetary adjustment



Source: Ref. 5:p. 895

Figure 2.1. Disputes Process--Contracts Disputes Act (CDA) of 1978

or interpretation of contract terms or other relief. It is important to note at this point, the additional duties performed by Agency Boards of Contract Appeals, outside the realm of the CDA. Some boards, such as the Interior Board of Contract Appeals and the Agriculture Board of Contract Appeals, also serve as Administrative Review Boards under A-76 disputes procedures.

3. Budget and Accounting Act of 1921 (31 USC 71)

The Competition and Contract Act (CICA) of 1984 has recently provided the General Accounting Office (GAO) with specific statutory authority to decide contractor protests against award (sometimes referred to as pre-award or bid protests). However, GAO has always possessed and exercised these powers under the general authority to audit and settle accounts, provided under 31 USC 71. Many of the practices and procedures developed by GAO in the past have now been codified unchanged by CICA. Although the majority of protests against contract award are filed directly with GAO, protesters may also file directly in a federal court. [Ref. 15:pp. 13-14]

4. Federal Court Improvement Act of 1982

The CDA of 1978 and CICA of 1984 do not provide coverage for all controversies between the government and other parties. As previously mentioned, civil disputes involving matters not arising under, or relating to a specific contract are not subject to these acts. They are litigated under the "regular" federal judicial review procedures. An example of

this type of civil suit would be the case where a veteran sued the federal government because he lost his veteran's preference position as a result of a CA study.

Prior to the Fifth Circuit Court of Appeals Reoranization Act of 1980, the federal judicial system consisted of various courts and review bodies as reflected by Figure 2.2. Note from the figure the sequence of appeals and the jurisdiction of the various bodies. The reorganization act revised this system by splitting the Fifth Circuit Court into two appeals courts thereby resulting in 12 U.S. Courts of Appeal.

The FCIA of 1982 further revised the system as follows:

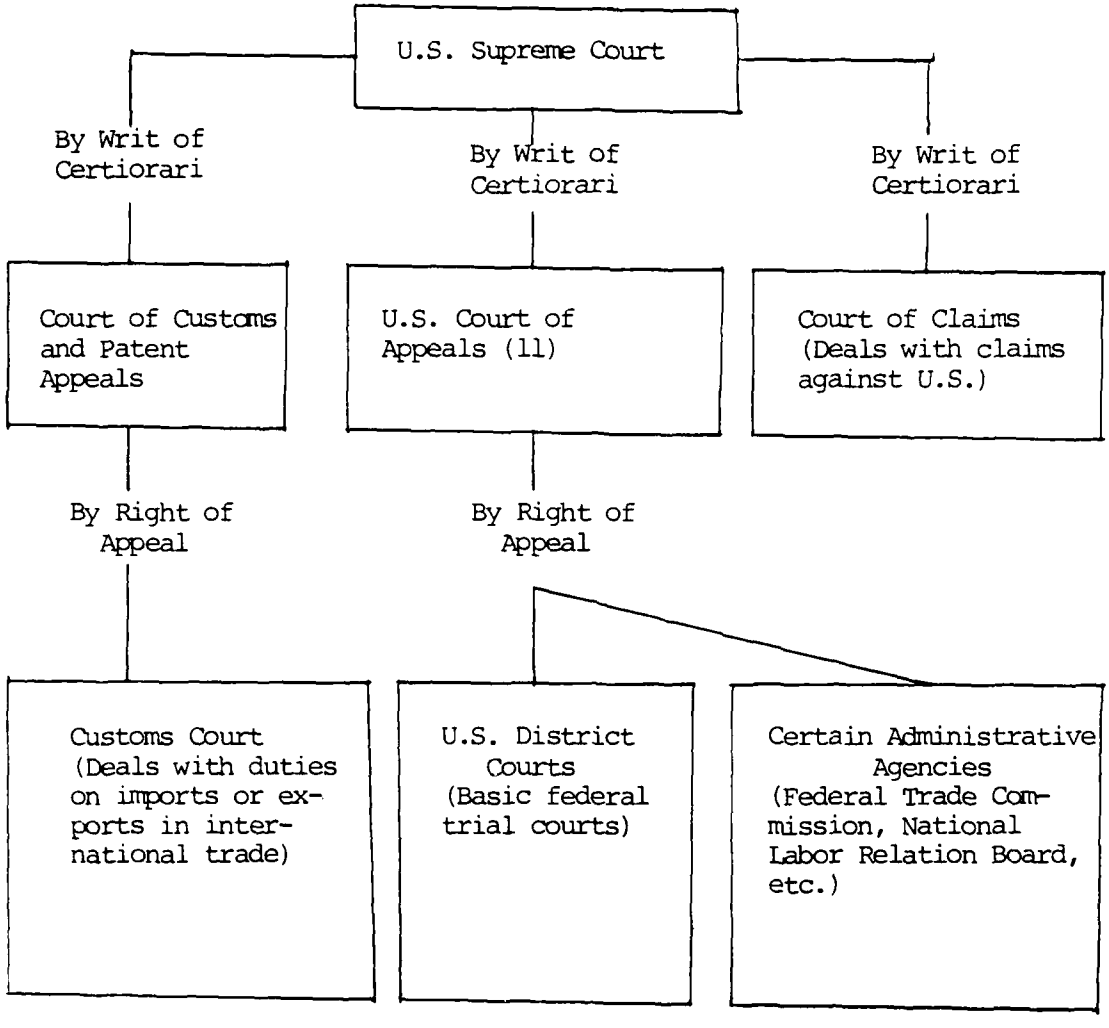
a. Eliminated the specialty courts (i.e., Court of Customs and Patent Appeal, and Court of Claims) by combining and incorporating them into a 13th appeals court, the Court of Appeals for the Federal Circuit. This additional appeals court was established to handle appeals of cases requiring special expertise in certain fields (such as government contracts, customs and patents) which were nonexistent in the other appeals courts.

b. Established the Claims Courts to handle trials/adjudications and to "enter dispositive" judgments for claims against the government. This authority differs from that of the former Court of Claims. The Court of Claims was only authorized to issue recommended decisions.

A flow chart of the present judicial system, as midofied is illustrated by Figure 2.3.

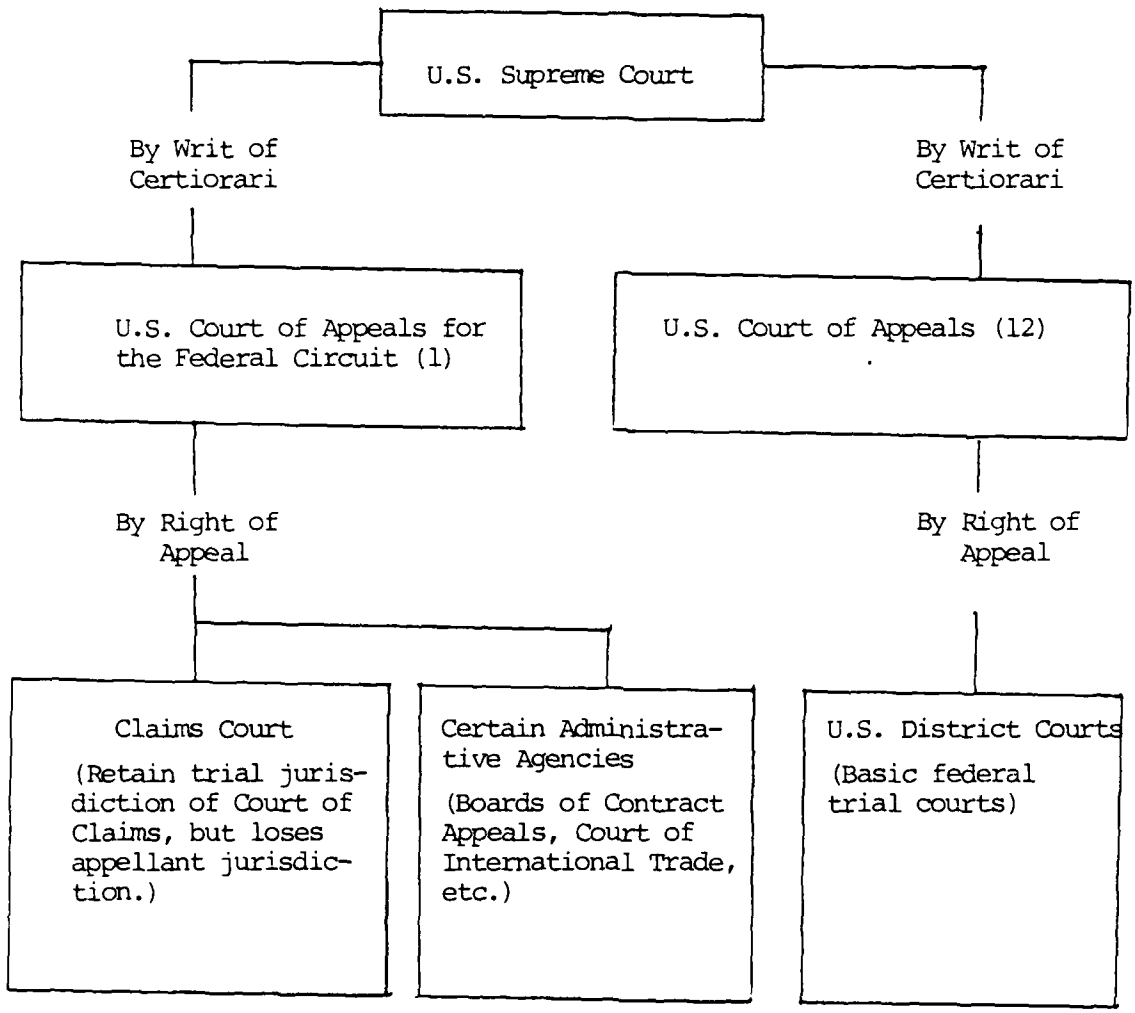
5. Summary

Disputes involving Circular A-76 implementation has various channels within the federal judiciary system by which they can be litigated. Post-award contract disputes of matters falling under or relating to covered government contracts are



Source: Portland State University Law School

Figure 2.2. Federal Judicial System Immediately Prior to the Reorganization Act of 1980



Source: Author's Research

Figure 2.3. Federal Judicial System After the Federal Court Improvement Act (FCIA) of 1982

handled by agencies' Boards of Contract Appeals or other federal courts specified in accordance with the CDA of 1978. Bid protests are normally filed with the GAO under the CICA of 1984. However, protesters can also file suit in the Claims Court for relief. Other civil suits not falling under the jurisdiction of the CDA of 1978 or the CICA of 1984 are handled by the "regular" judiciary process as defined by the FCIA of 1982.

III. DATA PRESENTATION

A. GENERAL

As previously mentioned, data used in this study were primarily obtained from the FLITE data base. For the purpose of this study, FLITE's data are defined as digests, slip opinions, and excerpts or full text copies of judicial decisions. The amount of data obtained was influenced by the "search strategy" used to extract legal decisions and the extent of legal decisions located within FLITE's data base. FLITE uses a word or group of words (referred to as key word(s) index) to search resources within its own system or accessed other legal systems including JURIS, LEXIS, WESTLAW, DIALOG, LEGI-SLATE and REGULATE. The combined resources of FLITE and other accessible legal systems includes federal, state, military court decisions, administrative agency decisions, statutes, pending regulations, law review articles, and many nonlegal data bases of interest to attorneys [Ref. 16:p. 3]. The search strategy consisted of:

1. Restricting the search to decisions rendered by GAO, federal courts, and Boards of Contracts Appeals.
2. Utilizing keywords index of "contracting out" and "A-76."

This strategy reflected a general search pattern that was designed to capture the maximum number of decisions involving A-76 implementation as confined by stated restrictions.

Alternative research methods, such as manual searches and personal interviews were also used to augment data obtained from FLITE. Although not presented in this section, information gathered by these alternative methods are reflected in Chapter V.

B. DATA

The voluminous nature of the data obtained precludes displaying it in its entirety in the text of this study. Instead, numerical summaries are illustrated by the following tables and figure.

Table 3.1 is a breakdown, by judicial entities of the number of decisions rendered. References are also provided indicating specific legal texts used to compile the data base. Since a "global" search of all decisions relating to A-76 was conducted, with no restriction as to specific time frames, the dates noted refer to cases actually searched and not cases found. Also, note that only 11 Boards of Contract Appeals (BCA) decisions were obtained. The lack of BCA data is directly attributable to a weakness in the research methodology rather than the "actual" number of BCA cases litigated. Further discussions of this flaw in the research methodology are presented in Chapter IV.

Table 3.2 presents the same data in a different format. It illustrates the results of litigations in terms of cases decided in favor of the government, against the government, and split decisions.

TABLE 3.1

NUMBER OF LEGAL DECISIONS INVOLVING A-76

Decisions	References	# of Cases
Comptroller General of the United States	Published and Unpublished Decisions, January 1921 thru January 1985	178
Boards of Contract Appeals	Vols 56-2 thru 70-2, July 1956 thru Nov 1970; Vol 71-1 thru 81-2, Nov 1970 thru Oct 1981; Vol 82-1 thru 83-2, Nov 1981 thru Sep 1983; Unpublished Aug 1984 thru Jan 1985	11
U.S. Claims Court	Reporter, Vols 1 thru 6 (p. 565) Oct 1982 thru Mar 1985	5
U.S. Court of Claims	Vols 1 thru 229, Oct 1863 thru Feb 1982	0
U.S. District Court	Federal Supplement Vols 1 thru 605, Aug 1932 thru Mar 1985	7
U.S. Court of Appeals	Federal Reporter 2D series Vols 1 thru 749, July 1924 thru Jan 1985	5
U.S. Supreme Court	Supreme Court Reporter Vols 96 thru 105, Jul 1975 thru May 1985; U.S. Reports Vols 1 thru 422, Sep 1754 thru Jan 1975	0
TOTAL		206

Source: Author's Research Data

TABLE 3.2

BREAKDOWN OF LITIGATIONS DECIDED IN FAVOR/AGAINST THE FEDERAL GOVERNMENT

Decisions	# of Cases Decided in Favor of the Government	# of Cases Decided Against the Government	# of Cases Ending in Split Decisions
Comproller General of the U.S.	158	18	2
Board of Contract Appeals	8	3	0
U.S. Claims Court	3	1	1
U.S. Court of Claims	-	-	-
U.S. District Court	3	3	1
U.S. Court of Appeals	5	0	0
U.S. Supreme Court	-	-	-
TOTAL	177	25	4

Source: Author's Research Data

Figure 3.1 is a graph of the frequency of distribution of decisions with respect to the passage of time. Further discussions of the data in Table 3.1, 3.2, and Figure 3.1, are presented in Chapter IV.

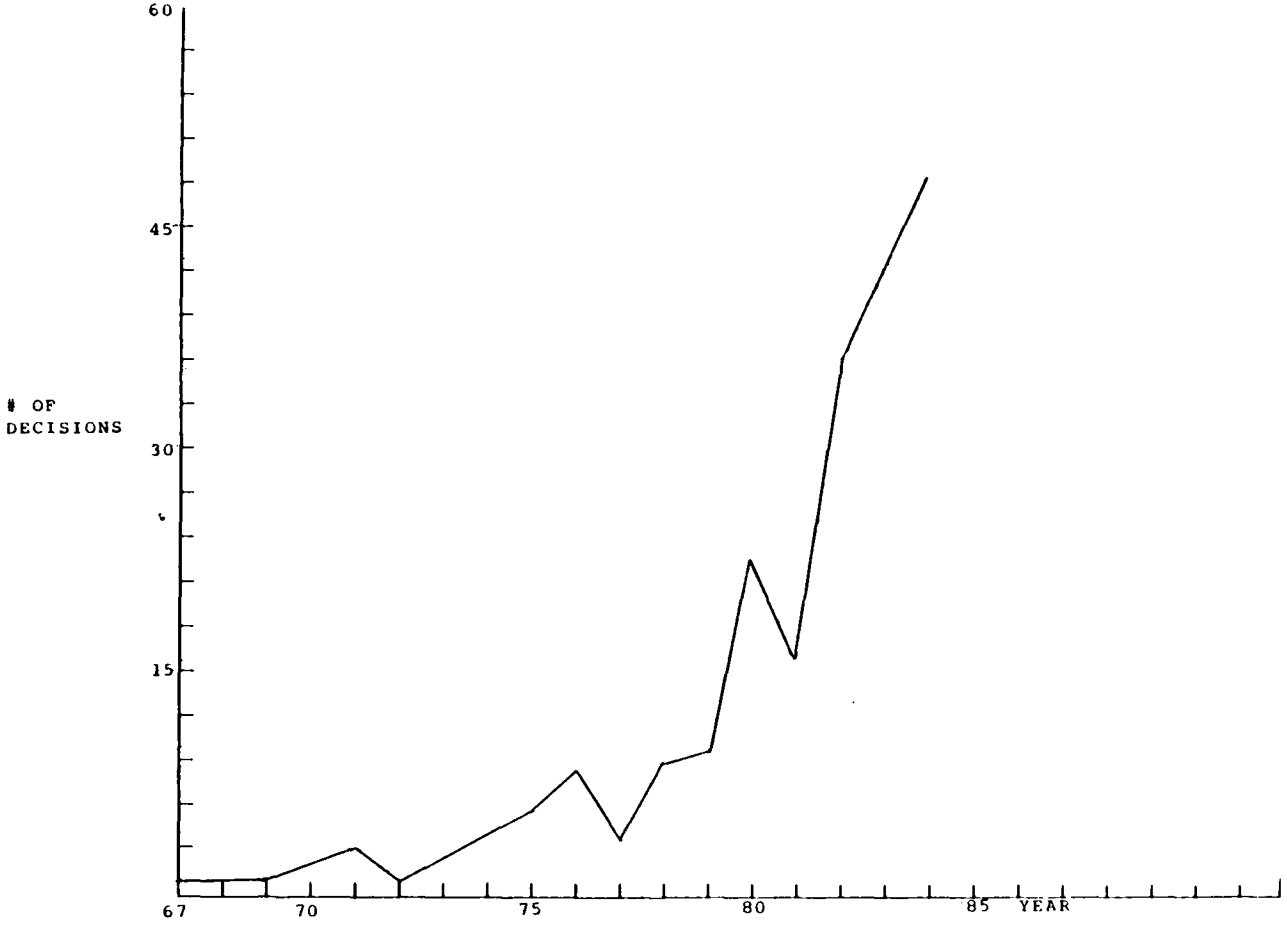


Figure 3.1 Distribution of Decisions Per Year

Source: Decisions of Federal Courts, GAO
and Boards of Contract Appeal

IV. ANALYSIS/FINDINGS

A. GENERAL

What issues and problems in implementing the Commercial Activities program are revealed by litigations? What is the magnitude of litigations involving the CA process? In view of issues addressed by court cases, can distinct trends or patterns with regard to CA implementation be identified? What are some of the factors that determine good performance work statements? These questions are applicable portions of the primary and subsidiary research questions which will be dealt with by this section of the study. They have been restated herein, to redirect the reader's attention on some of the major objectives of this study.

Note that the first question is related to an issue raised by one of primary research questions. However, this question will be dealt with on a more detailed level of analysis than the primary research question envisions. Chapter V will summarize key issues and problems based on the detailed analysis and findings presented herein.

Discussions of analysis and findings are also organized around the decisions rendered by judicial entities. These entities consist of GAO, Boards of Contract Appeal, U.S. Claims Court, U.S. District Courts and U.S. Court of Appeals.

B. MAGNITUDE OF LITIGATIONS

1. "Purely" A-76 Issues

As illustrated by Table 3.1, a total of 206 legal decisions were obtained from FLITE. Based on the extensive data base accessible by FLITE and the global search pattern used (i.e., The search pattern was not restricted to any time frame. In some instances, recorded decisions, as far back as the year 1863 were searched.), it is assumed that the data obtained approximately represent the sum total of all Comptroller General (Comp Gen), Boards of Contract Appeals and federal courts recorded decisions rendered on "purely" A-76 issues.

2. Other Than "Purely" A-76 Issues

Decisions rendered by Boards of Contract Appeals and other litigations appealable to higher federal courts under the CDA of 1978 are excluded from this assertion for reasons which follow. When FLITE scans legal decisions stored in data bases, it searches for the key word(s) or patterns of key words specified in the search strategy. If those word(s) or patterns of words are not found in the legal text, it cannot extract the data. In situations involving purely A-76 issues, judges are likely to mention "A-76" or "contracting out" in their written decisions. This provides a reasonable assurance that the search strategy could obtain the necessary data.

On the other hand, decisions falling under the auspices of the CDA of 1978 are not purely A-76 issues. For these same

reasons, judges are only likely to mention "A-76" or "contracting out" in passing when writing up their decisions. As a result, BCA and federal courts decisions rendered under the CDA of 1978 are not fairly represented in the data obtained.

3. Summary

An in-depth analysis of the 206 decisions obtained revealed that 201 involved purely A-76 matters. The remaining were post-award disputes reviewed by the BCA.

C. GENERAL TRENDS

1. Data Presented in Table 3.1

Approximately 86 percent of the decisions were rendered by GAO. No decisions were rendered by the U.S. Court of Claims or the U.S. Supreme Courts.

2. Data Presented in Table 3.2

Table 3.2 indicates an interesting phenomenon. Approximately 86 percent of the cases were decided in favor of the federal government. The federal government in this case being agencies of the executive office such as OMB and OFPP or other executive agencies responsible for implementing and executing A-76. Approximately 12 percent of the cases were decided against the government and the remaining 2 percent were split decisions.

3. Data Presented in Figure 3.1

A rough correlation between the number of A-76 decisions per year (i.e., decisions rendered by GAO, BCA and federal courts) with respect to the passage of time is displayed

graphically by Figure 3.1. The graph clearly shows that the rate of decisions per year has increased with the passage of time. A dramatic acceleration in the rate occurred between 1979 and 1980 (more than doubled), and has continued throughout 1984.

The year 1955, in lieu of 1967, might appear to the reader to be a logical starting point for the display of data since it marked the publication of the executive branch's first policy on CA. However, no legal decisions were found preceeding 1967. Therefore the years between 1955-1966 were not shown on the graph. Also the reader should note that calendar year 1985 was discounted for analysis purposes, since, because of timing reasons, it includes incomplete data.

A possible reason for the acceleration in rate of decisions in the later years can be explained by exploring the relationship between the rate of litigations and the chronological development of A-76.

Evidence accumulated by the author's research strongly suggests that few A-76 actions were made in the initial stages of A-76 implementation. No empirical data could be found to support this assertion because it appears that, prior to 1980, inadequate statistical records were maintained on CA. For example, it was not until 1981, with the passage of the Department of Defense Authorization Act, 1981 (P.L. No. 96-342 (1980)), that the DoD was required by Congress to report on the performance of CA [Ref. 12:p. 2]. However, the following quote is

illustrative of the types of evidence found to support the author's claim:

> It [A-76] had been on the books but it had been completely ignored, and we now had statutory responsibility in OFPP to see that the policy was properly implemented. As we looked at what had been done in most agencies, we found that . . . there was clearly no management direction in the agencies placing any priority at all on implementation of this policy. [Ref. 2:p. 5]

With the creation of OFPP in 1974, serious attempts to "fully" implement A-76 policies were made for the first time in 20 years [Ref. 2:p. 5]. As changes were made to improve upon the process and increasing emphasis on its implementation continued, the magnitude of contracting out increased. For example, in DoD alone, over $350 million in annual cost savings were generated from the 1979 version of Circular A-76. [Ref. 2: p. 128]

The author concludes that the lack of contracting out activities during the initial stages of the CA program may have contributed to the lower rates of legal decisions during earlier years, since opportunities for disagreements were minimal. Conversely, the increase in A-76 activities during later years may have created an environment where the opportunities for disagreement between key players flourished. Logically, a corresponding acceleration in the rate of litigations would have followed, particularly during the years after 1979, when the Reagan Administration took office.

4. Summary

A clear majority of litigations were decided by GAO. Some of the courts rendered no decisions at all.

The federal government was highly successful in litigating A-76 protests.

The acceleration in the rate of A-76 litigations appears to correlate with the increasing emphasis on the CA program.

D. GENERAL ACCOUNTING OFFICE

1. General

GAO decisions represent the overwhelming majority (approximately 86 percent) of the cases obtained through FLITE. General trends previously mentioned are therefore mirrored by GAO data.

2. Methodology

Each of the 178 cases was individually analyzed to determine issues, problems and weaknesses of CA implementation, policies and procedures. The data obtained from the analysis were synthesized into various categories or groupings for presentation. Categories consisted of headings such as: GAO jurisdiction, evaluation of cost estimates, conflict of interest, etc. Only pertinent findings were highlighted herein. They were chosen based upon the frequency of occurrence or the importance a decision had on the A-76 process. It was also noted that this same methodology was used for analysis of BCA and federal court decisions.

3. General Accounting Office Jurisdiction

a. Conditions for GAO Jurisdiction

The Comptroller General involvement in the CA program involves settling certain bid protest disputes resulting

from CA implementation. The Comptroller General will entertain protests when a protester alleges faulty or misleading cost comparison between the in-house estimates and contractors bid. In a landmark case, Crown Laundry and Dry Cleaners Inc., B-194505, July 18, 1979, they highlighted their reasons for entertaining such protests:

> . . . We would consider it detrimental to the government to decide to award or not award a contract based on a cost comparison analysis that did not conform to the terms of the solicitation under which offers were solicited.

The Comptroller General has on occasion applied this same rationale for hearing cases that on first appearance, seem to be outside its bid protest authority. For example, in Space Age Engineering, Inc., B-209543.2, April 19, 1984, the Comptroller General reviewed a protest that a contract was improperly terminated. Contract terminations normally involve contract administration and therefore fall under the CDA of 1978. However, the Comptroller General considered the protest because the basis for the agency's action to terminate resulted from an alleged deficiency in the initial contract award. So, whenever the competitive bidding system is at issue, the Comptroller General will generally hear the protest. [Ref. 17]

b. Conditions Precluding GAO Jurisdiction

On the other hand, the Comptroller General has consistently expressed and upheld conditions under which it will not review protests. It has repeatedly refused to render decisions concerning the propriety of an agency's determination

under A-76 to contract out in-house work. The Comptroller General's position is that the question as to whether an agency of the executive branch of the government may perform commercial activities in-house or contract with commercial contractors for such products or services was not covered by any specific statute, regulation or instruction which would place a decision of this type under the legal jurisdiction of the Comptroller General. [Ref. 18]

The Comptroller General has further stated the following:

> The directives incorporated in Bureau of the Budget Circular No. A-76, are matters of Executive policy, prescribed by the Bureau of Budget as the agent of the President designated by executive order No. 8248 of September 8, 1939, to assist the President in the formulation and administration of the fiscal program of the government and to advise the Executive Departments and agencies in the areas of administrative organization and practice. . . . Thus, the propriety of determination by an executive agency . . . is not a matter permitting ruling in terms of legal rights and responsibilities. We therefore find no legal basis for objections to the proposed administrative action, and we must decline to rule upon the policy question involved, which we deem to be a matter for legal resolution within the Executive Branch. [Ref. 18]

The impact of this particular position is crucial because it has far reaching effects on other related judicial reviews. For example, federal courts are not bound by Comptroller General determinations. But they often rely on Comptroller General decisions as precedence in matters relating to governmental contract issues. Related situations whereby the Comptroller General has refused to review protests are detailed by the following fifth-order headings.

(1) Federal Employee/Labor Union Protest. Comptroller General has applied the doctine that determinations to contract out under OMB Circular A-76 are a matter of executive branch policy and therefore bid protests filed by federal employees or their representative unions are not reviewable by GAO. This position was expressed in decisions, Sidney R. Jenkins, B-217045, November 27, 1984 and American Federation of Government Employees, Local 1662, B-214123, February 7, 1984. The former case involved a bid protest filed by a foreman employed at the water and sewage plant at Fort Detrick, Maryland. He contested the Department of Army decision to contract for services instead of performing them in-house. The Comptroller General dismissed the protest by saying it only considers A-76 protests which allege faulty or misleading cost comparison of in-house estimates with bids received. It further stated that:

> This protects the competitive system by assuring that a cost comparison analysis conforms to the terms of the solicitation under which bids were submitted. This exception is narrowly drawn, intended to protect parties that have submitted bids from the arbitrary rejection of their bids and does not extend to non bidders. [Ref. 19]

The Comptroller General concluded that Mr. Jenkins was not a bidder and therefore his protest was not reviewable by them.

Basically, the same findings were expressed in the latter case. Here the Comptroller General determined bid protests filed by unions, employees or taxpayers were also not reviewable.

(2) Procedural Matters. The Comptroller General will not normally consider protests that it considers "procedural"

in nature. Issues involving such things as scheduling of a post-award debriefing falls under this category. In a related case, PAN AM World Services, Inc., B-215308.5, December 10, 1984, the contractor, among other things, protested contract award on the basis that the agency refused to hold a debriefing. The Comptroller General dismissed this portion of the protest and concluded that scheduling of debriefing was procedural in nature and did not affect the validity of the award.

4. Legislative Agency/Administrative Office of U.S. Courts

The Comptroller General has determined that legislative agencies and administrative offices of U.S. Courts are not governed by OMB Circular A-76 policies applicable to executive agencies. In Comptroller General decision Photo Data, Inc., 208272, March 22, 1983, the contractor protested the Government Printing Office (GPO) cancellation of the solicitation. The protester argued that any decision of the GPO to perform the work in-house rather than resoliciting should have been done in accordance with A-76. The Comptroller General denied this protest and further stated that whenever GPO performs printing work for executive agencies, it does so under its own authority and is thus not an agent for an executive agency.

In a related decision, Datars, Inc., B-199437, November 12, 1980, the protester contended that a government (i.e., Administrative office of the U.S. District Court) estimate of cost to perform work in-house did not adhere to A-76 standards. The Comptroller General deemed the protest irrelevant because

the estimate was prepared by an administrative agency of the U.S. Courts and was therefore not subject to A-76 which is directed to heads of executive departments and establishments.

5. Revisions to Circular A-76/Effective Date

Determining the appropriate Circular A-76 revisions to be used for a particular cost study requires a careful analysis of the circumstances surrounding the specific situation. There are no set, iron-clad rules. Ordinarily, where the solicitation fails to indicate specific standards to be used in conducting cost comparison under OMB Circular A-76, offerors may assume that the procuring agency will apply the published procedures in effect at the time, not those previously effective. [Ref. 20] However, where the application of the standards in effect at the time would have resulted in erroneous cost comparison, GAO will not object to the agency's use of prior standards.

The complexity of this issue is aptly illustrated in a series of related Comptroller General hearings Homes and Narver Services, Inc., B-212191, November 17, 1983, and Morrision Knudsen Company, Inc., B-212191.2, April 17, 1984. In the former hearings, the contractor protested that the Army erroneously determined that TM-6, modification to Circular A-76 (Revised) dated 29 March, 1979, was inapplicable because TM-6 was officially implemented by the Army on July 27, 1982, three working days before the receipt of initial offers. The solicitation was subsequently amended three times. The Comptroller

General sustained the protest primarily because they felt the Army had ample time to comply with the new regulations.

However, on a reconsideration of the initial decision, B-212191.2, the Comptroller General reversed the decision. The Comptroller General concluded that the ". . . prior decision was based on the premise that because TM-6 was in effect when offers were submitted for these procurements, it should be applied in order to assure a proper and fair cost comparison" [Ref. 21]. Because it later became clear that the application of TM-6 would have resulted in erroneous cost comparisons, the Comptroller General concluded that the Army's initial decision was appropriate.

The Comptroller General has also determined that:

a. Agencies are not required to use certain A-76 cost comparison revisions when waivers have been granted by higher commands and amendment to RFPs informed all concerned of procedures to be used.

b. Agencies granting of waivers to revised A-76 provisions are at executive agencies discretion and not reviewable by GAO.

6. Performance Work Statement/Statement of Work (PWS/SOW)

a. Needs Established by Agency

Typically GAO will not question an agency assessment of its needs as expressed in the PWS/SOW unless the protester can show that the agency's determination of needs are clearly unreasonable. The burden of proof falls squarely on the shoulders of protesters. This basic premise has been a difficult obstacle for protesters to overcome although seemingly convincing arguments have been advanced.

Dyneteria, Inc., B-211525.2, October 31, 1984 illustrates this point. The contractor protested the Air Force decision to cancel invitations for bids (IFB) after bid opening because they felt the agency did not have legally sufficient justification. The solicitation was issued to meet the requirements for fuels management operation at Kelly Air Force Base for a base year and two option years. Subsequent to the issuance of the IFB, the procurement office learned that an anticipated increase in the requirement was necessary because of an anticipated change in the mix of aircraft to be stationed at the air base. As a result, the contracting officer cancelled the IFB because the original scope of work no longer reflected the activity actual minimum needs. The protester argued that the decision to cancel was based upon estimates of projected or anticipated changes in needs and not on actual increased requirements. Therefore, the Air Force justification did not meet the "cogent and compelling" standard to justify post bid cancellation.

The GAO denied the protest and reiterated its basic hands-off policy with regard to agency determination of needs ". . . as long as it reflects a reasonable judgment based upon the investigation and evaluation of information reasonably available at the time the decision is made" [Ref. 22].

b. Revision of Specifications

Sometimes solicitations contain specifications which misstate the needs of the agency or the procuring agency

decides that a less expensive approach than provided for in the bids is possible. Reissuance of revised specification may be in the best interest of the government. However, protesters have argued that in A-76 cost studies agencies are, in effect, competitors with contractors. Revisions to specifications and cancellations should be closely scrutinized. GAO has, for the most part, treated these situations as the agency's right to determine its need and has decided accordingly.

c. Ambiguous/Inadequate Specifications

GAO has generally determined that SOWs set forth in solicitations as inadequate when it does not sufficiently advise offerors of the tasks to be performed and the deficiency could have materially affected their bids. For instance, offerors were not told of tasks performed by existing contracts, rather than by in-house employees. This misconception often resulted in distorted bids covering these contracted efforts. GAO recommendations usually result in resolicitation or a recomputation of cost estimates taking into account the distortion. However, whenever ambiguous/inadequate SOWs have no material impact on the cost comparison outcome, GAO will dismiss the protests.

7. Adjustments/Recomputation of Cost Estimates

OMB Circular A-76 specifies that the government in-house estimate and the contractor's bids/proposals shall be based on the same PWS. GAO have held that the government may be justified in properly adjusting its estimates, even after

bid opening, if it is discovered that the estimate materially deviates from the scope of work specified in the RFP or IFB [Ref. 23].

In Trend Western Technical, Corp., B-212410.2, December 17, 1983, the protester alleged that, when the government estimate is found to be non-responsive to an IFB or RFP, it should be disqualified. No adjustment should be made by appeals boards. In reply, GAO asserted that the government estimate provides a standard against which bids and proposals are evaluated. As such, its estimates are not subject to the normal bid and proposal rules such as responsiveness and competitive ranges. The GAO has also allowed agencies to adjust their in-house cost estimates when:

a. It is discovered that the government in-house cost estimate was not prepared in accordance with the applicable Cost Comparison Handbook.

b. Higher agency directives (other than OMB Circular A-76) appropriately allowed for inflation adjustment.

On the other hand, the Comptroller General has sustained protests against cancellation of solicitations when the government alleged that cancellation was appropriate because its in-house cost estimates were not based on the solicitation's scope of work and GAO concluded that the agency could have easily adjusted its estimates.

8. Evaluation of Cost Estimates

a. Conflict of Interest

Protesters charges of government employee conflict of interest have been difficult to prove. In all cases the

protesters must be able to clearly substantiate their claims. In D-K Associates, B-213417, April 9, 1984, charges were alleged that their proposal was not fairly evaluated because all members of the evaulation committee were employees of the base who would be affected, at least indirectly, by the A-76 decision. GAO found nothing that indicated the evaluators acted inappropriately.

GAO will not attribute bias to an evaluation panel simply on the basis of inference or supposition. GAO does not believe that a conflict of interest is created simply as a result of an evaluator having routine dealings with the organization subject to the cost study review [Ref. 24]. Even in situations where the evaluator's job was directly in jeopardy, conflict of interest protests were not upheld when the evaluator's role was limited or actual prejudice was unlikely because of other extenuating circumstances. [Ref. 20]

b. Evaluator's Judgment

In reviewing protests alleging improper evaluations, GAO will not substitute its judgment for those of evaluation boards. GAO has given evaluation boards a wide range of discretion and will only examine the record of a particular case to determine whether judgments made were reasonable and in accordance with listed evaluation criteria and procurement regulations.

GAO has given the government the benefit of the doubt when disputes exist on a question of fact. When the

only evidence present consists of contradictory assertions, GAO has stated the protester has not lived up to the "burden of proof" doctrine.

9. Adequacy of In-House Estimates

GAO views the validity of the government cost estimate as solidified when certain conditions are met:

a. The in-house estimate must be based on the same PWS/SOW as was specified in the solicitation.

b. The agency must comply with procedures specified in the solicitation for conducting the cost comparison study. Failure to comply casts doubt on the validity of the in-house estimate and ultimately the outcome of the cost comparison evaluation.

When these basic conditions have been met, it becomes difficult for protesters to successfully litigate charges of improper in-house estimates.

Other factors, such as materiality, documentation, and independent validation of in-house estimates, play important roles in assuring the reliability of in-house estimates. While the protester bears the burden of proving that an A-76 cost comparison was materially deficient, the agency should identify and document all elements of the cost comparison. Otherwise, protesters may meet their burden of proof when the agency's failure to do so reasonably places the outcome of the evaluation in doubt. [Ref. 25]

10. Fairness in Management/Cost Studies

A primary argument used by contractors in protesting A-76 cost studies is that the government has unfair advantages in preparing their in-house estimates. The Comptroller General

has recognized that the government may have inherent advantages in an A-76 exercise.

> It is well-settled that while the government and offerors must compete on the same statement of work, they may be subject to different legal requirements in obtaining or performing contracts that may cause the commercial concerns to suffer a cost disadvantage. [Ref. 26]

As long as the ground rules for conducting cost comparison studies set out in the solicitation and the Cost Comparison Handbook are adhered to, the protester's disagreement is a question of executive policy which GAO will not review. GAO will not question the fairness of the ground rules themselves.

A summarization of key GAO decisions are provided below to illustrate the type of determinations they are inclined to render:

a. Inaccurate historical workload data provided by the government to bidders to estimate performance cost is not, by itself, a basis for sustaining a protest. This is particularly true when the data was not a precise prediction of intended workload or actual cost incurred. GAO has based its decision on the premise that bidders should use the PWS as the principal basis for calculating costs and not historical costs. [Ref. 21]

   However, if historical costs are provided, both the government and the contractor should use the same historical cost base. For example, the agency is not allowed to provide bidders with 1981 historical workload data while the government uses 1982 data. [Ref. 21]

b. The agency's access to its installation, employees and other generated information is not a privilege that must be given to bidders. This inherent advantage is similar to the advantage enjoyed by an incumbent contractor. Likewise, A-76 procedures do not address the elimination of the government advantage.

c. Agencies may have inherent advantages in organizing its manpower that cannot be duplicated by contractor.

The agencies reliance on this advantage in estimating its cost is allowable.

11. Administrative Appeals Boards

a. "Interested" Parties

In Contract Service Company, Inc., B-210796, August 29, 1983, the National Federation of Federal Employees and a Navy employee questioned certain aspects of a cost comparison study. The Navy's Administrative Appeals Board subsequently revised the government in-house cost estimate as a result of an extensive review of the cost comparison documents. The contractor protested the board's action to the GAO. The protester alleged that the board improperly revised the government in-house estimate because the revision was based on an appeal by a local union and a government employee and not by "interested" parties. The term, "interested" parties, is defined as one who has a legitimate interest in the outcome of a particular CA cost study.

The GAO denied the protest. The GAO concluded that Circular A-76 and related regulations allow bidders and affected parties such as employees and their unions to make appeals to the Administrative Appeals Board. [Ref. 27]

b. Composition of Administrative Appeals Board

Protesters, on occasion, have disagreed with the composition of Administrative Appeals Boards. When the solicitation or other referenced documents do not set forth any criteria for the composition of boards, GAO will not sustain such protests.

c. Exhaustion of Agency's Administration Review Procedures

The Comptroller General has consistently determined that it will not consider protests until the protester has exhausted the contracting agency administrative review procedure set forth in the solicitation. Thus, if a protester fails to raise an objection to a cost comparison study with the Administrative Appeals Board, GAO will decline to review it.

d. Agency Refusal to Comment on Appeals of Board's Decisions

Agencies have used internal regulations as a defense for not commenting to GAO on issues raised in protester's appeals of board's decision. In particular, the Navy has used DoD Instruction 4100.33, "Operation of Commercial and Industrial-Type Activities," as justification. This instruction is an intra-agency regulation that implements Circular A-76 within the Department of Defense. Paragraph 9c of the regulation states that ". . . the administrative review is not subject to our negotiation, arbitration, or agreement with affected parties . . . ."

As a result, the Navy has argued that discussing issues of the administrative review or the propriety of its final determination were precluded. In these cases, GAO will make determinations based on the facts at hand. Where protests are sustained, GAO will not reconsider the agency request to now provide information related to the case.

12. Miscellaneous Findings

a. General

These findings are categorized as miscellaneous because they deal with issues that are narrower in scope and, in many cases, have already been indirectly addressed by preceding findings. They are separately highlighted because of their impact on A-76 cost estimates and evaluations.

b. Depreciation/New Equipment Cost

Depreciation on new equipment can be computed from the time such equipment is budgeted as opposed to starting from the time the equipment is actually installed. Agencies have considerable discretion in determination of depreciation schedules as long as they are based on reasonable assumptions or mandated regulations. It is reasonable to use budget estimates as an evaluation figure for new equipment purchases as long as actual needs exist and the agency has taken steps to obtain the necessary funding. [Ref. 28]

c. Administrative Cost

GAO has upheld the DoD policy excluding G&A and certain other overhead expenses (i.e., underutilized personnel costs) from the government in-house estimate when the government's cost is essentially the same, whether or not the activity is contracted out. These "sunk" costs do not affect the in-house estimates unless contracting out would eliminate a whole man-year of work from outside the work center. [Ref. 26]

d. Direct Labor Cost Determination

Cost comparison under A-76 should be based upon direct labor rates anticipated for federal employees during the first year of the performance period rather than federal pay rates effective during the earlier period of applicable wage determination. [Ref. 20]

It is inequitable for the government to estimate its cost on a straight line basis while the contractor's cost estimates include anticipated labor cost increases that are not otherwise reimbursable by equitable adjustment clause. The reverse is applicable to the government. For example, in construction contracts containing the Davis Bacon clause, the government should not inflate its in-house construction labor costs if the contract allows for equitable price adjustments. [Ref. 21]

The Cost Comparison Handbook mandates that inflation factors should not be applied to salaries of government employees subject to the Service Contract Act (SCA). GAO has acknowledged that applying the provisions of the SCA is a complex matter. For example, a supervisor who performs an excessive amount of "non-exempt" work may be a working foreman subject to the SCA, rather than an exempt bonafide executive. Nevertheless, GAO has determined that agencies, in conjunction with the Department of Labor, have the responsibility for making this determination which GAO will not ordinarily question unless shown to be unreasonable. [Ref. 21]

e. Employment Outlook/Retained/Severance Pay

According to GAO, agencies are not required to use past statistics or actual experience of employment opportunities for federal employees affected by contracting out in estimating retained and severance pay. A-76 guidance only suggests that they may use historical data and only requires that agencies make an estimate of the impact of contracting out a function. Therefore GAO views the agencies estimation as largely a judgmental matter. A protester's disagreement with an outlook for employment does not, by itself, invalidate the agencies forecast. Even if the agency's estimate turns out wrong, at worst, it exercised poor judgment and is not subject to GAO overturn. [Ref. 28]

E. UNITED STATES CLAIMS COURT

1. General

U.S. Claims Court decisions represent approximately 2 percent of the cases obtained through FLITE. Their decisions seem to be in consonance with GAO determinations.

2. Methodology

Cases were analyzed and findings were developed using the same methodology as was utilized for GAO decisions.

3. Adjustments to In-House Estimates

The 1979 and 1983 versions of the A-76 Cost Comparison Handbook allow the government to correct errors discovered in its cost estimate after bid opening, under certain conditions. This policy was consistently upheld by GAO. The reasoning

behind allowing adjustments results from the overriding purpose of A-76, which is ". . . to assure the most economical performance of federal activities through a comparison of the estimated cost to the government of acquiring a product or service by contract and of providing it with in-house, government resources" [Ref. 30].

The Claims Court agrees with and adopts the reasons underlying the GAO decisions. Absent pervasive and compelling evidence presented by protesters, the court will allow agencies to reestimate their bid to correct certain deficiencies. [Ref. 30]

4. Legislative Agencies

The Claims Court reiterates the position that OMB Circular A-76 is not binding on legislative agencies, per se. However, the Court has also ruled that there are exceptions to this rule. For example, in Internal Graphics, Division of Moore Business Forms v. U.S., 4CL. CT. 186(1983), GPO (a legislative agency) incorporated the principles of the A-76 Cost Comparison Handbook in their solicitation as the method of determining whether a printing function would be retained in-house or contracted out. The solicitation was subsequently cancelled and International Graphics protested. One reason being that GPO did not adhere to A-76 Cost Comparison Handbook guidelines in determining the successful bidder. GPO aruged that the contractor could not protest on this ground because A-76 was not binding on legislative components.

However, the Claims Court concluded that because the principles of the A-76 Cost Comparison Handbook were incorporated into the solicitation, as a matter of law, such principles become terms of an implied contract of fairness between the government and the contractor. Because GPO deviated from the Cost Comparison Handbook in such a way that provided no rational basis for evaluating the bid, their cancellation action was deemed improper. [Ref. 31]

5. Revisions to Circular A-76/Effective Date

Interpretations by the Claims Court have implied that the Circular revision in effect as of the date of bid submission should be utilized. However, the courts also seem to provide the government wide ranges of discretion in deciding which A-76 revision to utilize when a recent revision has been effected. [Ref. 30]

6. Claims Court Jurisdiction

The court has determined that it lacks jurisdiction over suits brought by employees or unions representing them, to enjoin the government from awarding contracts under A-76. The Federal Courts Improvement Act (FCIA) of 1982 confines their injunctive authority to contract actions such as equitable adjustment of bid protests. Non-bidding parties, threatened with economic injury from the award of government contract, are not "contract claims." Therefore remedies should be pursued in the District Courts under the Administrative Procedure Act (APA) of 1976. [Ref. 32]

7. Conflict of Interest

Allegations of conflict of interest among government employees involved in A-76 cost comparison studies have been argued by protesters in terms of actual bias and the appearance of impropriety. The Claims Court has taken the position that agency procurement officials enjoy significant discretion in evaluating bids and proposals. Their judgment will not be questioned unless it was clearly demonstrated by protesters to be arbitrary or without rational basis. The courts have also concluded that inference of conflict of interest cannot be substituted for the required clear and convincing proof. One must present "clear and convincing evidence" to overcome the presumption that government employees have acted conscientiously in the performance of their duties. [Ref. 31]

For example, in Space Age Engineering, Inc., v. United States, 4 CL. CT. 739(1984), the court determined that the mere fact that a project manager on a competing bidder's proposal had retired three years earlier as director of supply at an Army depot which had solicited bids under an A-76 cost study, did not result in a conflict of interest. The courts concluded that conflict of interest was not a serious concern because the director had retired prior to the cost analysis, SOW preparation and in-house bid preparation. Furthermore, his involvement in the A-76 study, as director, was limited to actions of a general nature.

The APA allows the District Court to review an agency's action, except where statutes prevent judicial review or the agency action is committed to agency discretion by law. At times, the courts have taken the attitude that judges are not in the business of running the military services and that orderly government requires that the judiciary exercise discretion when it interferes with legitimate military matters. In these situations, the courts have felt that judicial review in the procurement process has been narrowly prescribed. [Ref. 34]

Lately, the District Courts have taken the opposite view. When the courts believe that an agency's decision does not require superior knowledge and experience of military professionals and the issues involve compliance with existing regulations, they are more inclined to assert jurisdiction. [Ref. 35]

According to some courts:

> Limited inquiry into an agency's compliance with regulation is proper. As the courts reasoned in Derecktor, such an inquiry is an acceptable compromise between judicial abdication of responsibility to review the regulatory process and substitution of a court's views on the merits for those of the agency. [Ref. 35]

5. Federal Employee/Labor Union Protest

The court's position on federal employees and their unions right to maintain suit against contracting out appears to parallel the court's position on its jurisdiction to review agencies decisions. In other words, if the courts determine that they have the right of judicial review, then, they have

also maintained federal employees rights to bring suit. The reverse is also apparently true.

The courts have expressed the opinion that the APA fosters the presumption of judicial review to government employees suffering legal inequity because of agency actions. The review of agency action should not be deterred unless there is compelling reason to believe that Congress intended such action. [Ref. 35]

An opposite position expressed is that A-76 is a managerial and policy tool, which does not provide government employees legal rights to sue under the APA [Ref. 34].

G. UNITED STATES COURT OF APPEALS

1. General

Only 2 percent of the decisions obtained through FLITE were U.S. Court of Appeals. The Court of Appeals decisions tended to be consistent among the various appeal courts and from one period of time to another.

2. Methodology

Cases were analyzed and findings developed using the same methodology as was utilized for GAO decisions.

3. Court Jurisdiction

The Court of Appeals has consistently held that agency's decision to contract out was an agency discretion of law, not subject to judicial review. The courts have reasoned that A-76 decisions involve military and managerial activities and expertise inherently unsuitable for review by the judicial

system. The APA did not provide government employees and their unions a judicial forum to contest A-76 cost studies. [Ref. 36]

4. Veterans Preference

Appellants have contended that the Veterans Preference Act protects veterans from being replaced by private sector employees. However, the Court of Appeals has dismissed these suits, stating that veterans are entitled to have retention preference over other civil service employees but not employees of private contractors performing CA functions. [Ref. 37]

5. Administrative Remedies

The court has generally upheld the "exhaustion" doctrine. It requires protesters to utilize the internal administration appeals process prior to appealing to higher judicial bodies. However, they have also indicated that administrative remedies are not required if the process is inadequate, futile or serves no purpose. [Ref. 37]

6. Collective Bargaining Agreements

The courts have upheld agencies rights under Title VII of the Civil Service Reform Act of 1978. The act provides that the obligation of agencies to bargain with union negotiators over the condition of employment does not pertain to the agencies exercise of its management rights. In other words, agencies can reserve the right to contract out and to determine the personnel to perform a function. [Ref. 38]

H. BOARDS OF CONTRACTS APPEAL (BCA)

1. General

BCA determinations represent only 5 percent of the decisions obtained through FLITE. 6 out of the 11 decisions resulted from the board functioning as an A-76 administrative review board. These decisions are classified as purely A-76 issues. The remaining 5 decisions were issued under the jurisdiction of the CDA. Findings presented reflect purely A-76 issues only. Data obtained on post award disputes did not reveal any problems or issues pertinent to OMB Circular A-76.

2. Methodology

Cases were analyzed and findings developed using the same methodology as was utilized for GAO decisions.

3. Prohibition Against Contracting Out

Boards have consistently determined that they will not review protests against cost comparison studies pursuant to A-76 when Congress has enacted statutes prohibiting the award or when no specific appropriation has been provided to fund the award. According to the baord, issues were made "moot" by such congressional actions. [Ref. 39]

V. LESSONS LEARNED/RECOMMENDATIONS/SUMMARY

A. GENERAL

This chapter identifies lessons learned and recommendations which are drawn from the data presented in Chapter IV. In doing so, it ties together portions of the primary and subsidiary research questions dealt with in the previous chapter and the remaining portions of the research questions that are yet to be answered. Since key concepts and objectives of this study are also embodied in the following discussion, it is recommended that the readers reacquaint themselves with the primary and subsidiary research questions.

B. LESSONS LEARNED

The preponderance of litigations involving purely A-76 matters are decided by the Comptroller General under their bid protest authority. This particular trend is highlighted by Table 3.1, located in Chapter III. The number of litigations, alone, suggest that GAO has played a major role in shaping the legal environment surrounding A-76. Their involvement is likely to remain substantive, considering the evolutionary changes that Circular A-76 will continue to experience and the resulting conflicts that are likely to ensue.

The CICA of 1984 has also solidified future GAO influence on CA. Not only has it statutorily codified prior GAO authority, it has also expanded the remedies available to protesters.

Renumerating successful protesters for court costs and providing a mechanism for suspending contract award or performance, pending resolution, are a few. As a result of CICA, protesters may be incentivized to pursue litigations under bid protest procedures more vigorously.

The Federal government has experienced great success in litigating A-76 protests. Their won/loss record, as demonstrated by Table 3.2, reveals that protesters chances of successfully litigating their positions on purely A-76 matters have been extremely dismal. The low success rate can be attributed to a myriad of factors. One possibility is that government personnel involved in CA have done a very good job in adhering to A-76 implementation rules and guidance, at least in terms of "legal soundness." Another likely possibility is that protesters are prone to litigate issues regardless of its legal merit. Either protesters feel that they have nothing to lose, or perhaps, they are lacking in knowledge concerning A-76 procedures and government contract laws.

The data indicate that GAO and the courts allowing the government wide ranges of discretion in judgmental issues significantly influences protesters success rate. The overwhelming burden of proof is on the protester to show that the government acted capriciously or unreasonably. Historically, protesters have not had great success in doing so.

Perhaps the competency of Administrative Appeals Boards has affected the government success rate. Most litigations

must first be reviewed by the boards prior to appeal to GAO or the federal courts. It is possible that the boards have screened out many of the cases in which the government position was unsupportable.

The overwhelming position of the Comptroller General and federal courts is that they will refuse to render decisions concerning the propriety of an agency's right to contract out under A-76. Their arguments for this position are based primarily on the provisions of the Administrative Procedure Act. The act stipulates that courts cannot review an agency's action where statutes prevent judicial review or where an agency's action is committed to agency discretion by law. The court's contention is that A-76 is not covered by a specific statute and, therefore, are matters of executive discretion and policy.

On a few occasions, the U.S. District Courts have deviated from this basic position. However, the U.S. Courts of Appeals have, in fact, nullified these deviations by consistently affirming the executive agency's right to contract out under A-76.

The implications of the courts determination that it lacks jurisdiction to review the propriety of A-76 are far reaching. Federal employees and their unions are not within the "zone of interest" to file suits with the GAO or federal courts. They can only file protests with Administrative Appeal Boards. In essence, only prospective bidders under bid protest action are allowed judicial review.

An agency failure to comply with the procedures specified in the solicitation for conducting cost comparison studies casts serious doubts on the validity of the outcome. When this situation occurs, it becomes much easier for protesters to meet the "burden of proof" doctrine. Common errors made by agencies include:

a. Failure to base their in-house estimates on the same PWS/SOW as specified in the solicitation.

b. Failure to adequately document their in-house cost estimates.

Nevertheless, discrepancies made by agencies that are procedural in nature or do not materially impact the validity of the outcome are ignored.

Legislative agencies and administrative offices of the courts are not bound by A-76 policies, per se. Circular A-76 is directed to heads of executive agencies only. However, if A-76 procedures are incorporated into solicitations as a means to determine whether to contract out, as a matter of law, these procedures become binding on the legislative and judicial bodies.

The effective dates of revisions, by itself, does not determine whether it is binding on a cost comparison study. This dilemma has fostered confusion among industry and government personnel which can eventually result in needless litigations. A-76 circulars provide that revisions are effective upon publication and shall apply to all studies in process where cost comparison decision has not yet been approved. [Ref. 3:p. 3]

Court's decisions have sometimes dictated otherwise. The applicable revision depends upon the circumstances of each issue. Some rules of thumb are helpful in making the appropriate choice:

a. The revision set forth in the solicitation usually provides the baseline from which to work.

b. Subsequent approved revisions should be utilized, provided that there is enough time to revise the solicitation prior to the specified bid/proposal receipt date.

c. Whenever a solicitation fails to indicate specific standards to be used, the revision in effect as of the date of bid submission is appropriate.

d. Resulting erroneous cost comparison studies or higher level/agency waivers can also affect the appropriateness of a revision.

The adequacy of performance work statements/statements of works are issues commonly litigated. Determination of an agency's actual needs is a favorite issue protesters have pursued. They are also likely to question any revisions to specifications made by the government. The courts will generally not question an agency determination of its needs, unless the protester demonstrates them to be clearly unreasonable. Results from litigations have shown that this is difficult to do. Agencies are usually justified in revising their specification whenever they misstate their needs.

Inadequate PWS/SOW will normally be determined when the solicitation provides for contractor work that is not actually performed by in-house personnel and vice versa.

Agencies are allowed to adjust or recompute their in-house cost estimates after bid/proposal opening. The courts have

proclaimed that the government estimates are not bound by the normal bid and proposal rules, such as competitive ranges and responsiveness. As such, adjustments to in-house estimates are the preferred method to correct errors, rather than cancellation and resolicitation.

Evaluation boards enjoy a significant amount of discretion in evaluation cost estimates. Courts will not substitute their judgments for the judgments of the evaluation boards. In this respect, conflict of interest claims are diffulct to prove. The appearance of impropriety is not sufficient to prove conflict of interest even in cases where the government evaluator job was directly in jeopardy of being contracted out.

The courts will not question the fairness of Circular A-76. They have recognized that the government enjoys certain inherent advantages. These advantages include:

a. The use of Exemption 5 under the FOI. The government is allowed to delay releasing certain documents related to its in-house estimates to prospective bidders until after bid opening.

b. Agencies access to its resources (i.e., facilities, information, etc.) which is not a privilege that must be given to bidders.

c. Agencies advantages in organizing its manpower and resources, and reporting costs in such a way that cannot be duplicated by contractors.

As long as the ground rules established for conducting studies are adhered to, protesters disagreements are a matter of executive policy not reviewable.

Protesters must exhaust all administrative remedies prior to judicial review by GAO or the federal courts. Failure to do

so will result in dismissal of protests. The courts are apparently trying to make sure that issues are resolved at the lowest possible level. No data were available to demonstrate the magnitude of issues resolved in the Administrative Appeals Boards. However, there were few cases appealed from either the GAO, U.S. Claims Court or the U.S. District Courts to the U.S. Court of Appeals.

Collective bargaining agreements cannot preclude the agency's right to contract out. The courts have upheld the agency's right under the Civil Service Reform Act of 1978.

GAO decisions are consistently applied. It is the author's opinion that they can be relied upon as precedence for the outcome of future conflicts. On occasions, federal courts have utilized GAO expertise in bid protests to assist them in rendering their decisions.

GAO will not be deterred from rendering decisions when agencies refuse to provide relevant information. In these situations, GAO will make a determination based on the facts on hand. Motions for reconsideration by agencies are usually denied.

Congressional prohibitions against contracting out have not been overturned. These prohibitions can be placed into effect by the enactment of statutes or regulations, or the failure to fund a contracted effort.

C. RECOMMENDATIONS

Government personnel responsible for formulating and implementing A-76 policies and procedures should become

infinitely familiar with GAO decisions. By far, GAO has had the most impact on the day-to-day activities of conducting cost comparison studies. An analysis of the data indicated that their influence will continue in the future. By recognizing the GAO's position on issues, government personnel may be able to avoid the pitfalls that result in protests and unsuccessful litigations. They can also use results of GAO decisions to assist in obtaining that "competitive edge" necessary to formulate winning in-house cost estimates.

The issuance of bulletins, which provide results of pertinent legal decisions to activities involved in CA studies, can play an important role in educating government personnel.

Greater emphasis must be placed on ensuring that cost studies are conducted in accordance with applicable A-76 guidelines. Increased training and oversight are important, particularly in the area of PWS/SOW preparation, cost estimation, and documentation. Failure to follow applicable guidelines and to document what was done may invalidate winning in-house bids. The wasting of precious resources occurs whenever cost comparison studies must be redone.

Solicitations should always specify the applicable A-76 documents that are intended to be utilized for a cost comparison study. The A-76 circular, supplements, lower level department instructions and the effective revision should be cited. Any deviation or waivers from these documents should also be indicated. This would eliminate a lot of confusion as to the

ground rules for conducting A-76 studies. Whenever possible, the agency's position on how they intend to handle subsequent revisions would be helpful.

Agencies should ensure that their union contracts contain language which reserve their management rights to contract out. The Civil Service Reform Act of 1978 provides this right to agencies. It appears that the absence of such language in the collective bargaining agreement may jeopardize the agencies position, if the union claims that their union contract prohibits such contracting out.

Circular A-76 Supplement (Revised 1983) Part I, Chapter II, paragraph I(2) and (7) needs to be clarified. Paragraph I(2) provides that appeals procedures do not authorize an appeal outside the agency or provides for a judicial review. GAO and the federal courts have supported this position with respect to government employees and their unions. But their actions strongly suggest that this provision has been ignored when protesting bidders are involved. For example, GAO and the Federal courts have consistently determined that protesters must first exhaust the administrative appeals process prior to judicial review. This language seems to indicate that they have de facto appeal rights from A-76.

Paragraph I(7) provides that decisions of an appeal are not subject to negotiation, arbitration or agreement. Agencies have occasionally used this as a defense for not responding to GAO request for information concerning appeals from

Administrative Appeals Board's determinations. GAO has consistently demonstrated their resolve to render decisions on the facts on hand, irregardless of the agencies position. Adhering to guidelines that place agencies at a disadvantage in judicial reviews is counter-productive.

Adjustments to government in-house estimates should be done when mistakes or errors are found after bid/proposal opening and the adjustment can be easily made. GAO position is that adjustments, rather than cancellation of solicitations, are appropriate when circumstances dictate. Agencies should be aware that cancellation of solicitations merely to forestall contracting out decisions will likely be protested and sustained by GAO.

Emphasis on government sponsored workshops should be a mainstay of efforts to reduce potential litigations. Workshops will enable the government to more thoroughly educate potential bidders concerning the rules and guidelines of A-76. This will be particularly helpful for small businesses or other businesses not familiar with the complexities of A-76. The workshops will also assist in establishing open communications between the government and industry. Better educated bidders and improved communication will help to curb unnecessary protests.

D. SUMMARY

The history of Circular A-76 has been marked by a continual struggle between diverse groups, both within, and outside the

federal government. Disputes between opposing forces have often resulted in litigations. Based on an analysis of the data presented, it appears that litigations have had some impact on the formulation of published regulations and policies.

But more importantly, results of litigations have dramatically affected the actual execution of the A-76 process. Practical techniques and procedures related to the "real world" litigious environment are revealed. Important considerations for developing most efficient organizations, in-house cost estimates, and evaluating bids and proposals are some of the issues explored by litigations. These are most important to the practitioner when conducting A-76 cost studies.

With the increasing emphasis on contracting out to promote savings and efficiency in the federal government, past experience suggests that legal decisions will continue to play an important role in the viability of the CA program. It is the author's opinion that one series of related decisions rendered by GAO and federal courts hold the key to the success of the CA program in the future. The courts have consistently maintained that "contracting out is an executive discretion not reviewable by them" [Ref. 36]. This position has handcuffed all attempts by federal employees and their union to attack the viability of Circular A-76 through the judicial process. Time and again, AFGE has sought to enforce A-76's own language in court, only to be met by OMB objection that Circular A-76 has no force of law or regulation. [Ref. 2:p. 45]

Just as importantly, the court's position has also provided the government with the "upper hand" in litigating bid protests. Many of the issues involve agency judgments, which the courts will generally not question. Even the fairness of A-76 procedures, themselves, are not subjected to review.

Based on the foregoing data, and analysis and findings, it is concluded that contracting out is a practical undertaking in the real world litigious environment, as long as the courts maintain their present position concerning propriety of agencies right to contract out.

E. AREAS FOR FUTURE RESEARCH

Based on the results of this study, further research in the following areas are recommended:

1. Lessons learned from litigations involving post-award contract disputes.
2. Future patterns of litigations involving quality assurance on base support service contracts.
3. The impact of Congressional involvement on CA.
4. Developing strategies and practices to enhance the government chances of winning A-76 competitions.

APPENDIX

LIST OF INTERVIEWS

1. Beere, J., Contracts Manager, Allstar Maintenance, Mountain View, CA, 11 July 1985 (Telephone).

2. Bell, Mrs., Director, Commercial Activities Program, Fort Ord Army Base, CA, 7 August 1985 (Personal).

3. Green, J., SUP012A, Naval Supply Systems Command, Washington, D.C., 9 July 1985 (Telephone).

4. Johnson, J., Attorney, OTT and Purdy Law Firm, Jackson, MS, 9 July 1985 (Telephone).

5. Keough, J., Attorney, Keough and Keough Attorney at Law, Pacific Grove, CA, 11 April 1985 (Personal).

6. McMullen, B., Headquarters, Naval Facilities Command, Washington, D.C., 9 July 1985 (Telephone).

7. Riley, G., Assistant Director, Commercial Activities Program, Fort Ord Army Base, CA, 7 August 1985 (Personal).

8. Truscott, W., Attorney, Contract Administration Law, Fort Ord Army Base, CA, 17 July 1985 (Personal).

9. Watkins, W., Judge, Arms Service Board of Contract Appeals, Washington, D.C., 1 August 1985 (Personal).

10. Wieczorek, R.J., Cdr., Director of Navy Regional Procurement Department, Naval Supply Center, Oakland, CA, 15 August 1985 (Personal).

LIST OF REFERENCES

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